Park 'N Go of Minnesota LP *and* International Brotherhood of Teamsters Local 120.[1] Cases 18–CA–17473 and 18–RC–17320

July 29, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On May 17, 2005, Administrative Law Judge Keltner W. Locke issued the attached bench decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed limited cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommend Order of the administrative law judge as modified below and orders that the Respondent, Park 'N Go of Minnesota LP, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

"(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this order."

2. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

"(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of employee Robin Lokken, and within 3 days thereafter, notify her in writing that this has been done and that the unlawful discharge will not be used against her in any way."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. July 29, 2005

Robert J. Battista,	Chairman
Wilma B. Liebman,	Member
Peter C. Schaumber,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of these rights guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT tell employees that we have discharged an employee because that employee supported a union or engaged in other activities protected by the Act.

WE WILL NOT tell employees that supporting a union may make an employee ineligible for reinstatement.

[1] We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL–CIO effective July 25, 2005.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001). We find merit in the General Counsel's exception and shall modify the judge's recommended Order to add a requirement that the Respondent expunge from its records any reference to the unlawful discharge of Robin Lokken.

WE WILL NOT condition the reinstatement of an employee on the employee's renouncing or abandoning support for a union.

WE WILL NOT discourage employees from supporting the Union by asking them to tell us their work-related grievances and promising to remedy those grievances.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Robin Lokken immediate and full reinstatement to her former position, or to a substantially equivalent position if her former position is not available, and WE WILL make Robin Lokken whole, with interest, for all losses she suffered because of our unlawful discrimination against her.

WE WILL notify Robin Lokken that we have removed from our files any reference to her discharge and that the discharge will not be used against her in any way.

PARK 'N GO OF MINNESOTA, LP

Sandra C. Francis, Esq., for the General Counsel
James F. Hendricks, Jr., Esq. and *Becky L. Voss-Kalas, Esq. (Fisher & Phillips, LLP)*, of Chicago, Illinois, for the Respondent.
Martin J. Costello, Esq. (Hughes & Costello), of St. Paul, Minnesota, for the Charging Party

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on March 9, 2005, in Minneapolis, Minnesota. On March 10, 2005, after the parties rested, I heard oral argument, and on March 11, 2005, I issued a bench decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "appendix A," the portion of the transcript containing this decision.[1] The Findings of Fact, Conclusions of Law, Remedy, Order and notice provisions are set forth below.

Complaint Paragraph 5(d)

Inadvertently, the bench decision did not address the allegations in complaint paragraph 5(d). Therein, the General Counsel had alleged that on about November 22, 2004, Respondent, by its Director of Operations Paul Rutigliano, in a memo circulated to all of its employees, warned them that supporting a union made an employee ineligible for employment. Respondent's answer admitted that it had circulated a memorandum indicating that Robin Lokken would not be reinstated.

Rutigliano had written the memo, to "All Park 'N Go Employees," because employees had signed a petition asking that Respondent reinstate Lokken. The memo stated that he had received this petition and continued:

> I always thought of Robin as a good worker, and understood that her reasons for attempting to organize a union have had everything to do with the problems she had with [Manager] Keith [Bateman]. So, I took steps to work out an arrangement with Robin that would allow her to return to work with full back pay and without loss of any of her benefits. I met with Robin twice last week to discuss her potential return. It was my full intention that she return to work as soon as possible.
>
> It came to my attention on Friday that on Thursday night Robin was helping the union to distribute handouts at the terminal pickup area. Furthermore, I have since heard that Robin is purporting to "Set the Record Straight" by telling you that I never planned to hire her back. That is simply not true.
>
> While I don't dispute her right to help the Teamsters while she is not employed here as a supervisor, the reason that we terminated Robin's employment in the first place was because we found that she was actively involved in the organizing drive. As a supervisor, we expected her to act in the best interests of the company, and we don't feel that having a union here is in the best interests of the company.
>
> You should understand that under the National Labor Relations Act, which protects the rights of non–supervisory employees, we were well within our rights to do so. "Employees," as defined by the Act, do not include "supervisors." Supervisory employees are not included for reasons that are intended to protect YOU. Allowing a supervisor, who has the power to recommend or initiate employee terminations, to take sides and get involved in union organizing activities would be to allow the Union the power to have employees who didn't support them fired.
>
> As you undoubtedly know by now, I have decided not to pursue bringing Robin back. Robin's continued involvement with the union while discussing reinstatement with me, in my view, indicates that she's not invested in making the relationship work. We just don't need that kind of divisive presence here.

This memo clearly communicates to employees that Respondent would not reinstate Lokken because of her continued union activities. There can be little doubt that such a statement violates Section 8(a) (1) of the Act. *Hospital Shared Services*, 330 NLRB 317, 318 (1999); *Grimmway Farms*, 314 NLRB 73, 74 (1994).

The memo asserts that Lokken did not enjoy the protection of the Act because she was a supervisor. For the reasons stated in the bench decision, I have concluded that Lokken was not a supervisor within the meaning of Section 2(11) of the Act. The fact that the memo incorrectly claims that Lokken's union activities were unprotected does not take the coercive effect out of the statement that Lokken would not be rehired or reinstated because of her continued support for the union. Accordingly, I

[1] The bench decision appears in uncorrected form at pp. 247 through 276 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as appendix A to this certification.

recommend that the Board find that Respondent violated the Act by the conduct alleged in complaint paragraph 5(d).

The Representation Case

To expedite resolution of the representation case, I recommend that the Board sever Case 18–RC–17320 and remand it to the Regional Director so that the challenged ballots cast by the five dispatchers may be opened and counted. The Employer asserted that these individuals were statutory supervisors but, for the reasons discussed in the bench decision, I have concluded that the Employer failed to carry its burden of proof on this issue.

It may be noted that the unit description set forth in the October 29, 2004 Stipulated Election Agreement does not mention the dispatchers. Rather, the Employer and the Union agreed that the dispatchers could vote subject to challenge. The Employer has contested the voting eligibility of these individuals only on the basis that they are supervisors, and has not advanced any other arguments for excluding these employees from the bargaining unit. The Stipulated Election Agreement describes that unit as follows:

> All full–time and regular part–time shuttle drivers, valets, and cashiers employed by the Employer at its 7901 International Drive, Minneapolis, Minnesota facility, excluding maintenance employees, office clerical employees, managers, and guards and supervisors as defined in the Act.

Like the shuttle drivers, valets and cashiers, the dispatchers receive an hourly wage rather than a salary. Some of the dispatchers regularly perform cashier duties. All are employed at a single location and have common supervision.

Although the dispatchers receive a higher hourly wage rate than other employees, and although they may work shorter shifts than some of the other employees, these differences do not cause the dispatchers' interests to diverge significantly from those of the other hourly workers. Accordingly, I conclude that the dispatchers share a community of interest with the other employees in the bargaining unit and appropriately should be included in that unit.

To summarize, I recommend that the Board overrule the challenges to the ballots cast by the five dispatchers (Annette Carlson, Melissa Dale, Gary Engelstad, Lilia Gomez, and Robin Lokken) and that these ballots be opened and counted. For the reasons discussed in the bench decision, I recommend that the challenge to the ballot cast by James Rock be sustained.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached as appendix B.

Additionally, Respondent must offer Robin Lokken immediate and full reinstatement to her former position or to a substantially equivalent position if her former position no longer is available. Respondent also must make Lokken whole, with interest, for all losses suffered because of its unlawful discrimination against her.

CONCLUSIONS OF LAW

1. The Respondent, Park 'N Go of Minnesota LP, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, International Brotherhood of Teamsters, Local 120, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by telling its employees that it had discharged an employee because of her union activities, by conditioning the employee's reinstatement on her abandoning support for a union, by warning employees that supporting a union made an employee ineligible for reinstatement, and by soliciting employee grievances and promising benefits to dissuade employees from supporting a union.

4. The Respondent violated Section 8(a)(1) and (3) of the Act by discharging employee Robin Lokken on about October 15, 2004 and thereafter failing and refusing to reinstate her.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent did not engage in any unfair labor practices alleged in the complaint not specifically found herein.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[2]

ORDER

The Respondent, Park 'N Go of Minnesota LP, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting and promising to remedy employee grievances, or making any other promise of benefits to employees to dissuade them from supporting a labor organization.

(b) Telling employees that it had discharged an employee because of her support for a labor organization or that her support for a labor organization made her ineligible for reinstatement.

(c) Conditioning the reinstatement of an employee on her abandoning support for a labor organization.

(d) Discharging and refusing to reinstate an employee because the employee joined, supported or assisted a labor organization.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[2] If no exceptions are filed as provided by Sec.102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

(a) Offer immediate and full reinstatement to employee Robin Lokken to her former position or, to a substantially equivalent position if her former position is no longer available, and make her whole, with interest, for all losses she suffered because of her unlawful discharge.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facilities in Minneapolis, Minnesota, copies of the attached notice marked "Appendix B."[3] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 15, 2004.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that the Respondent has taken to comply.

3. Case 18–RC–17320 is hereby severed from Case 18–CA–17473 and remanded to the Regional Director for Region 18 for further proceedings consistent with this Decision and Order.

Dated Washington, D.C. May 17, 2005

APPENDIX A

Bench Decision

This consolidated proceeded concerns the eligibility of certain individuals to vote in a Board–conducted representation election, and whether the employer of these individuals committed unfair labor practices. In particular, the Complaint alleges that Respondent unlawfully discharged employee Robin Lokken because of her Union activities. Because I conclude that she was not a supervisor within the meaning of Section 2(11) of the Act, I find that her discharge was unlawful. Further, I conclude that she and four other persons employed as supervisor/dispatchers were eligible to vote in the November 30, 2004 election, and recommend that the Board overrule the challenges to their ballots. I am issuing this bench decision pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Procedural History

Case 18–RC–17320

On October 19, 2004, the International Brotherhood of Teamsters, Local 120, which I will refer to as the "Union" or the "Charging Party," filed a petition to represent certain employees of Park 'N Go of Minnesota LP, which I will call the "Employer" r "Respondent." The parties entered into a Stipulated Election Agreement which the Board's Regional Director for Region 18 approved on October 29, 2004. This agreement provided that the Board would conduct an election on November 30, 2004 and that the following employees would be eligible to vote:

> All full–time and regular part–time shuttle drivers, valets, and cashiers employed by the Employer at its 7901 International Drive, Minneapolis, Minnesota facility, excluding maintenance employees, office clerical employees, managers, and guards and supervisors as defined in the Act.

By entering into the Stipulated Election Agreement, the parties agreed that this unit was appropriate for collective bargaining. The parties did not agree, however, about the voting eligibility of the Employer's dispatchers. Instead, they agreed that these individuals could vote, subject to challenge.

At the election on November 30, 2004, the Board agent challenged the ballots of five persons employed as dispatchers because their names were not on the voter eligibility list. The Board agent also challenged the ballot of James Rock for the same reason. The Employer contends that Rock earlier had resigned, but the Union asserts that Rock was on a leave of absence.

The November 30, 2004 tally of ballots indicates that challenged ballots could determine the outcome of the election. More specifically, the tally of ballots states as follows:

> Approximate number of eligible voters……..……56
> Number of void ballots……...…None
> Number of votes cast for Petitioner……...……..25
> Number of votes cast against participating labor organization……...……...…..……24
> Number of valid votes counted……49
> Number of challenged ballots……..…...6
> Number of valid votes counted plus challenged ballots…55

Challenges are sufficient in number to affect the results of the election.

Accordingly, the Board must determine the voting eligibility of James Rock and the 5 dispatchers, whose names are Annette Carlson, Melissa Dale, Gary Engelstad, Lilia Gomez, and Robin Lokken.

On February 1, 2005, the Regional Director issued a Report on Challenged Ballots, Order Directing Hearing and Order Consolidating Cases, which I will refer to as the "Report and Order." It consolidated the representation case, 18–RC–17320, with an unfair labor practice case which I will now describe.

Case 18–CA–17473

On November 16, 2004, the Union filed the initial unfair labor practice charge in Case 18–CA–17473. The Union

amended the charge on November 23, 2004 and again on January 24, 2005. As amended, the charge alleged that Respondent interfered with, restrained and coerced employees in the exercise of rights guaranteed by the National Labor Relations Act, thereby violating Section 8(a)(1) of the Act, and discharged an individual, Robin Lokken, in violation of Section 8(a)(1) and (3) of the Act.

On February 1, 2005, after investigation of the charge, the Regional Director issued a Complaint and Notice of Hearing, which I will call the "Complaint." In issuing this complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the "General Counsel" or as the " government." On the same date, the Regional Director issued the Report and Order which consolidated the representation and unfair labor practice cases.

On March 9, 2005 a hearing opened before me in Minneapolis, Minnesota. The parties presented evidence on that date. On March 10, counsel presented or\al argument and today, March 11, 2005, I am issuing this bench decision.

Admitted Allegations

Respondent's Answer to the Complaint admits a number of allegations. Based upon those admissions, and upon a stipulation during the hearing, I find that the government has proven the allegations in Complaint paragraphs 1(a), 1(b), 1(c), 2(a), 2(b), 2(c), 2(d), 3, 5(a), and 6(a). More specifically, I find that the Union filed and served the unfair labor practice charge and amended charges as alleged, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, that Respondent meets the Board's standards for assertion of jurisdiction, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Additionally, based on Respondent's admissions, I find that on about October 29, 2004, Respondent, in a letter signed by its Director of Operations Paul Rutigliano, told an employee that the employee was fired for supporting a union organizing drive, as alleged in Complaint paragraph 5(a).

Similarly, based on Respondent's admissions, I find that on about October 15, 2004, Respondent discharged Robin Lokken, as alleged in Complaint paragraph 6(a).

Respondent has admitted some, but not all, of the allegations raised in certain other paragraphs of the Complaint. For simplicity, I will discuss these admissions later in this decision, in connection with the associated allegations which Respondent has denied.

Disputed Allegations

The 8(a)(1) Allegations

In subparagraphs 5(a) through 5(e), the Complaint alleges that Respondent violated Section 8(a)(1) of the Act by making certain statements to employees during the union organizing campaign leading up to the November 30, 2004 election. The first three of these subparagraphs concern statements Respondent allegedly made to dispatcher Lokken in connection with her discharge. The fourth subparagraph concerns a statement about Lokken's discharge which Respondent allegedly made to other employees. For clarity, at this point I will defer consideration of these allegations and address them later, in connection with the allegation that Respondent violated Section 8(a)(3) by terminating Lokken's employment.

Complaint subparagraph 5(e)

Complaint subparagraph 5(e), which Respondent denied, alleges that on or about November 26 and 27, 2004, Respondent, by its Owner and President John Bona Sr., in conversations with several employees, solicited employee grievances, promised a benefit package, and promised to address employees' concerns about scheduling in order to dissuade employees from supporting a union. To establish this allegation, the General Counsel relies upon the testimony of two Park 'N Go employees, Marvin Wallace and Jean Lee.

Wallace described an occasion when he went to Respondent's facility to pick up his paycheck. Wallace and another employee saw that Park 'N Go's president and owner, John Bona Sr., was present. They went over to Bona and introduced themselves.

Wallace testified that "after we introduced ourselves, Mr. Bona said he wants to make it clear that he doesn't want a union there." According to Wallace, Bona told them that he dropped the ball by hiring Keith Bateman to be manager of the Minneapolis operation, "but if we gave him another year he would make the working conditions a lot better. He promised to get us a benefit package."

Bona did not testify. Based on my observations of the witnesses, I believe that Wallace's testimony is reliable and credit it.

Employee Jean Lee described a similar meeting with Bona. Lee's testimony is somewhat confusing, but she indicated that Bona made comments about the Union and also promised to correct a problem with an employee's work schedule.

For several reasons, including demeanor observations, I do not credit Lee's testimony, which tended to be vague. Additionally, she first testified that Bona said he would "fix" the employee's schedule problem but later quoted Bona as saying he would "work on it."

When asked, during cross–examination, if she harbored any animosity or anger towards the company, Lee answered with a single word: "No." However, her tone of voice was so sharp it seemed to contradict the denial. Moreover, Lee then acknowledged that Respondent had discharged her father. Obviously, she might bear bad feelings towards Respondent for that reason, so I suspect that her tone of voice may have revealed her state of mind more accurately than what she said. In sum, I do not have a lot of confidence in Lee's testimony, and do not rely upon it.

Although Respondent's owner Bona did not take the witness stand, Respondent did call Paul Rutigliano, who was operations manager at Respondent's Minneapolis facility at the time. According to Rutigliano, Respondent's President Bona visited the Minneapolis facility on the weekend after Thanksgiving 2004, which was less than a week before the election.

In meetings with various employees, Bona—sometimes accompanied by Rutigliano, expressed his concerns about the Union. According to Rutigliano, Bona met with a total of more than 35 employees during this visit.

Bona carried a written speech and referred to it for "talking points," but did not read it verbatim. Bona's speech, which Respondent introduced into evidence, states as follows:

> Let me open this meeting by telling you how much I appreciate having you working at Park 'N Go. You are the backbone of our organization.
>
> You have truly opened our eyes with this union campaign. Until we started receiving some charges of discrimination and the petition from the Teamsters, we thought we had a happy group of co–workers. Paul tells me that's what it was like when he left here in _____.
>
> I want to assure you that we have been and continue to take the steps necessary to make this a place where our employees want to work.
>
> I can't tell you how disappointed I was to learn that you went to a third–party – the Teamsters – to speak for you. Our policy has always been that any employee can call either me or Roseann if they had any problems or issues with Park 'N Go in Minneapolis.
>
> I made the decision to have Paul come here to find out what the problems were prior to receiving the petition from the Teamsters. It didn't take Paul long to find out that we had a serious management problem.
>
> Based on Paul's recommendation, I terminated Keith's job as a member of our management team. I readily admit that I made a mistake in promoting Keith to a manager's position. That became very evident as soon as Paul arrived here.
>
> I promise that Keith will not hold a position in management at this facility again. I've been told that the Teamsters have told you that Keith will be back – you have my word that Keith will never manage this facility again.
>
> Paul has been meeting and talking with you in an effort to let you know what this election involves – what the results of the election mean to all of us. We have also given you information about this union. Frankly, they appear to be bad people. It appears they take your money and reward themselves very generously – hundreds of thousands of dollars per year!
>
> While I have admitted my mistakes, I think bringing in the Teamsters to represent you would be a huge mistake for your [sic] personally. All they can do for you is take your money. The Teamsters don't give you anything. Only our company can give you wages and benefits.
>
> The Teamsters have a reputation for strikes and violence. Are these the people you want as your representative. I'm shocked at the information we have found on this union. I truly believe working with Paul, Roseann and me can be far better for you – and we don't charge you to work with us.

(Respondent's Exh. 11; original in all capital letters.) In the speech, "Paul" refers to operations manager Paul Rutigliano and "Keith" refers to former facility manager Keith Bateman.

Operations Manager Rutigliano testified that he didn't hear Bona promise employees anything except on one issue. According to Rutigliano, when an employee requested that information concerning an employee's accrued sick and vacation days appear on the payroll stub, "we said that's something that we could probably do with our payroll company."

Before discussing whether any of Bona's statements to employees violated Section 8(a)(1) of the Act, a preliminary matter should be addressed. Complaint paragraph 4 alleges that Bona and Rutigliano are Respondent's supervisors within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act. However, Respondent has not admitted these allegations.

Instead, it answered Complaint paragraph 4 by stating as follows: "Respondent does not know what is meant by the phrase 'at all material times. . .' in the context of this paragraph, and, therefore, is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in paragraph 4 and demands strict proof thereof."

Bona's speech, which Respondent introduced into evidence, states in part "Based on Paul's recommendation, I terminated Keith's job as a member of our management team. I readily admit that I made a mistake in promoting Keith to a manager's position."

The speech thus indicates that Bona possesses and exercises authority to promote and discharge employees. That admission is consistent with the commonsense impression that a company's owner and president would have some of the powers of a supervisor which Section 2(11) of the Act enumerates. Accordingly, I find that at the time he spoke with employees in late November 2004, Bona was Respondent's supervisor and agent within the meaning of Sections 2(11) and 2(13) of the Act, respectively.

The same portion of Bona's speech just quoted also indicates that Operations Manager Paul Rutigliano made an effective recommendation that one of Respondent's managers be discharged. Moreover, Rutigliano testified that his duties as operations manager included overseeing all facets of the operation on a daily basis. Based on this testimony and the record as a whole, I conclude that while employed as Respondent's operations manager, Rutigliano was Respondent's supervisor and agent within the meaning of Sections 2(11) and 2(13) of the Act.

In sum, the statements which Bona and Rutigliano made to employees can be imputed to the Respondent. I will now consider whether such statements violated the Act.

Absent a previous practice of doing so, the solicitation of grievances during an organizational campaign accompanied by a promise, expressed or implied, to remedy such grievances violates the Act. See *Laboratory Corporation of America Holdings*, 333 NLRB 284 (2001). The present record does not establish that Respondent had a previous practice of soliciting grievances, and I conclude that it did not.

When an employer institutes a new practice of soliciting employee complaints during an organizational campaign, there is a compelling inference of an implicit promise to correct the inequities discovered and to convince employees that the combination of inquiry and correction will make union representation unnecessary. *The Park Associates, Inc., d/b/a Hill Park Health Care Center*, 334 NLRB 328 (2001), citing *DTR Industries*, 311 NLRB 833, 834 (1993).

In the present case, Respondent's own evidence indicates that Bona made more than an *implicit* promise to remedy past problems and thereby make union representation unnecessary. Bona's written speech, which formed the basis for his oral statements to employees, more than hints at such a promise. It conveys the promise inescapably.

At the outset, Bona's speech tells employees that "you have truly opened our eyes with this union campaign." In the next paragraph, the speech assures employees "that we have been and continue to take the steps necessary to make this a place where our employees want to work." The two adjoining paragraphs, considered together, clearly convey the message that after the union campaign made management aware of workplace problems, Respondent acted promptly to correct them and would continue to improve working conditions.

The speech then points out the action Respondent already had taken to remedy the situation which caused employees to seek union representation: Respondent discharged the facility manager. Going further, Bona's speech tells employees "you have my word that Keith will never manage this facility again."

The speech leaves no doubt about the connection between the union campaign and Respondent's promise to improve working conditions. At one point in the speech, Bona expresses disappointment that employees had gone to the Union, and then he reminds employees that they may come directly to him with their concerns.

Later in the speech, Bona states that the "Teamsters have a reputation for strikes and violence" and asks the employees rhetorically if these are the people they want as their representative. At another point in the speech, Bona says "Frankly, they appear to be bad people."

The Complaint does not allege this comment as a violation of Section 8(a)(1), so I need not decide whether it constitutes an expression of opinion lawful under Section 8(c) of the Act. Additionally, the record does not disclose whether Bona actually made this "appear to be bad people" statement during any of his conversations with employees. The written speech does not prove what words Bona used but only memorialized the ideas—the "talking points"–which Bona wished to communicate.

Moreover, as a rule, establishing that a statement violates Section 8(a)(1) does not require proof of the speaker's intent. Rather, the Board judges the lawfulness of a statement by considering the message it reasonably would convey to employees. The speech does not acquire relevance as a reflection of the speaker's intent because the 8(a)(1) allegation raises no issue of intent.

Nonetheless, the speech still has probative value because Bona referred to it when he spoke with employees and presumably it helped him stay "on message." Although the government need not prove the speaker's intent to establish an 8(a)(1) violation, evidence of the speaker's intent still sheds light on what the speaker actually communicated. Stated another way, it usually would be more likely that a speaker successfully communicated the message he intended to convey rather than some other message.

The written speech bears a definite similarity to the words which employee Wallace attributed to Bona. Wallace's credited testimony establishes that Bona said he did not want a union and assured Wallace that "if we gave him another year he would make the working conditions a lot better. He promised to get us a benefit package." Applying an objective standard, I conclude that an employee reasonably would understand Bona's statement to be a promise of benefits linked to the employees' rejection of the Union.

In its prehearing brief, Respondent argues that Bona's statements to employees "are simply not enough to constitute solicitation of grievances. While it is true that the Board has stated in the past that solicitation of grievances during a union organizing campaign constitutes an implied promise to remedy such grievances, that 'does not change the requirement that an employer must pose the question to employees: 'What are your gripes?'" Respondent cites *EFCO Corp.*, 327 NLRB 372 (1998), and the administrative law judge's decision in *Wal–Mart Stores, Inc.*, 2003 NLRB LEXIS 302, Case No. 16–CA–20391–0001–0 (June 10, 2003).

Respondent's argument focuses on the question posed to employees rather than the benefit the employer promises in response. However, it "is the promise, expressed or implied, to remedy the grievances that constitutes the essence of the violation." *Laboratory Corporation of America Holdings*, above.

As Respondent appears to concede, the Board has held that a new practice of questioning employees about their work–related complaints, begun during an organizing campaign, creates a rebuttable presumption that the employer is promising to remedy the problems. Respondent has not rebutted that presumption. Indeed, in this case Respondent's promise was not merely implied but overt.

In sum, based on Wallace's testimony, I find that Respondent's President Bona solicited employee grievances and promised a benefit package to dissuade employees from supporting the Union, as alleged in Complaint subparagraph 5(e). Further, I recommend that the Board find that Respondent thereby violated Section 8(a)(1) of the Act, as alleged in Complaint paragraph 7.

Complaint paragraph 5(e) also alleges that Respondent, by its President Bona, promised to address employees' concerns about scheduling to dissuade employees from supporting a union. Because I have not credited the testimony of Jean Lee, I conclude that the General Counsel has not established this allegation and recommend that the Board dismiss it.

The Discharge of Robin Lokken

Robin Lokken began work for Respondent, as a "dispatcher/supervisor," in November 2001. Respondent admits that it discharged her on October 15, 2004 because of her participation in the Union's organizing drive. Respondent's Director of Operations, Paul Rutigliano, sent Lokken an October 29, 2004 letter giving the following explanation for her discharge:

> Your employment was terminated on October 15, 2004 because we were made aware that you were instrumentally involved in soliciting and obtaining employee signatures in support of a union organizing drive. As a supervisor for Park 'N Go of Minnesota, LP, you should not have been engaging in such activities.

This letter not only provides evidence of Respondent's reason for discharging Lokken, it also forms the basis for the 8(a)(1) allegation raised in Complaint subparagraph 5(a). It alleges that on about October 29, 2004, Respondent, in a letter signed by its Director of Operations Paul Rutigliano, told an employee that the employee was fired for supporting a union organizing drive.

Respondent admits sending Lokken the letter, which is in evidence, but denies that the letter violated Section 8(a)(1) of the Act, as alleged in Complaint paragraph 7. Respondent's defense turns on whether Lokken was a supervisor within the meaning of Section 2(11). In view of Respondent's admission and the letter itself, I find that the General Counsel has proven the factual allegations raised by Complaint paragraph 5(a).

Respondent made other statements either to Lokken or to others about her discharge, and the Complaint alleges that some of these statements violated Section 8(a)(1). More specifically, Complaint subparagraph 5(b) alleges that on about November 16, 2004, Respondent, by its Director of Operations Paul Rutigliano, at a restaurant near the Embassy Suites Hotel in Bloomington, Minnesota, conditioned an employee's reinstatement on abandoning support for a union.

In its Answer to this allegation, Respondent admitted that Paul Rutigliano met with "former supervisory employee" Robin Lokken on or about November 16, 2004, to discuss her possible reinstatement. The Answer further stated that Lokken was told that because her position was supervisory, she would be expected to cease her union organizing activities in the event she were reinstated. During the hearing, Rutigliano gave testimony consistent with this admission. Accordingly, I find that the government has proven the factual allegations set forth in Complaint paragraph 5(b).

Complaint subparagraph 5(c) alleges that on about November 19, 2004, Respondent, by its Director of Operations, Paul Rutigliano, warned an employee that the employee's handbilling and other activities in support of a union prevented the employee's reinstatement. Respondent's Answer admitted that Rutigliano spoke with Lokken on about November 19, 2004.

The Answer further stated as follows: "Lokken was told that because she had been seen handing out union literature on the evening of November 18, after her discussion with Paul Rutigliano regarding reinstatement to her supervisory position, Respondent was no longer interested in reinstating her. Respondent denies the remaining allegations contained in paragraph 5(c)." At the hearing, Rutigliano gave testimony consistent with this admission. Based on Respondent's Answer and Rutigliano's testimony, I find that the General Counsel has proven the factual allegations raised in Complaint subparagraph 5(c).

Having found that the government has proven the factual allegations raised by Complaint subparagraphs 5(a), 5(b), 5(c) and 5(d), I must now consider whether Respondent's actions violated Section 8(a)(1), as alleged in Complaint paragraph 7. The lawfulness of Respondent's statements concerning Lokken's discharge depends on the lawfulness of the discharge itself, an issue I will now address.

Respondent has raised the defense that Lokken was a statutory supervisor, but before considering this defense I must determine whether Lokken's discharge would be lawful if she were not a supervisor. Obviously, if that were the case, Respondent's defense would be unnecessary.

In most cases, the Board evaluates the lawfulness of a discharge by applying the criteria it set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Where an employer clearly has discharged an employee for engaging in protected activities, a *Wright Line* analysis is not necessary. See, e.g., *Phoenix Transit System*, 337 NLRB 510 (2002); *Saia Motor Freight Line*, Inc., 333 NLRB 784 (2001).

Respondent's October 29, 2004 letter to Lokken plainly states that it discharged her for engaging in union activities. Under this unusual circumstance, *Phoenix Transit System* rather than *Wright Line* applies, and a *Wright Line* analysis is not necessary.

However, in case the Board should disagree with my conclusion that *Phoenix Transit System* applies, I will analyze the facts alternatively under the *Wright Line* framework. That framework requires the judge first to consider whether the General Counsel has presented sufficient evidence to associate the discharge with the protected activities of the discharged worker or other employees. If so, then the burden shifts to the Respondent to establish that it would have discharged the employee even in the absence of protected activities.

To make the required initial showing, the government must prove four elements. First, it must establish the existence of activity protected by the Act. Second, it must show that the Respondent knew about the protected activity. Third, the government must prove that Respondent took an adverse employment action against the worker. Finally, the government must show some kind of link or nexus between the protected activity and the adverse employment action.

Together, Respondent's admissions and its October 29, 2004 letter to Lokken satisfy all four requirements. Indeed, a single sentence of that letter establishes protected activity, employer knowledge, an adverse employment action, and the necessary connection: "Your employment was terminated on October 15, 2004 because we were made aware that you were instrumentally involved in soliciting and obtaining employee signatures in support of a union organizing drive."

The burden therefore shifts to Respondent to show that it would have taken the same action regardless of Lokken's protected activity. Typically, an employer meets that burden by establishing that it took the same action against other employees in circumstances which were similar except for an absence of protected activity. Respondent did not present evidence that it had discharged other employees in similar circumstances devoid of union activities and logically, it could not do so because it admittedly terminated Lokken's employment because of her union activities. For that reason, I have concluded that *Wright Line* does not apply.

In sum, if Lokken is an employee within the meaning of Section 2(3) of the Act, her discharge violated the Act. However, Respondent contends that Lokken was not a Section 2(3) employee but instead was a Section 2(11) supervisor.

The party asserting that someone is a supervisor, in this case the Respondent, bears the burden of proving it. *Benchmark*

Mechanical Contractors, Inc., 327 NLRB 829 (1999); *Alois Box Co., Inc.*, 326 NLRB 1177 (1998); *Youville Health Care Center, Inc.*, 326 NLRB 495, 496 (1998). If Respondent does not carry this burden, Lokken's discharge was unlawful and so were Respondent's statements about it described in Complaint subparagraphs 5(a) through 5(d).

Section 2(11) of the Act defines "supervisor" to mean "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." See 29 U.S.C. § 152(11).

To warrant a conclusion that a particular person meets the statutory definition of supervisor, the evidence must establish three elements: (1) That the individual had authority to perform at least one of the functions listed in the statute; (2) that the individual exercised this authority in the interest of the Employer, and (3) that the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.

Lokken worked for Respondent about 3 years. Her job title was "dispatcher/supervisor." Lokken testified that she sometimes referred to herself as a "supervisor" because the manager to whom she reported, Keith Batemen, used that term. Although there is some uncertainty, the record suggests that Bateman used the term "supervisor," rather than "dispatcher/supervisor," when referring to individuals in such positions.

Generally, Lokken worked the 2 p.m. to 10 p.m. shift, Monday through Friday, and typically, during the later part of that shift no one higher in the chain of command was present at the facility.

Lokken credibly described her job duties as greeting customers when they came in, telling them where to park, signalling for a shuttle to pick up the customers, making sure that a driver was at the proper airport location to pick up a customer returning from a trip, occasionally sending drivers to a terminal to pick up passengers, answering the telephone, and completing paperwork. The paperwork included a dispatch sheet and a Supervisor/Dispatcher Office Report form used as a kind of log to record events that happened on her shift. Other dispatchers also filled out such sheets. Lokken had a key to the cash box and counted the money received during her shift.

The record does not establish that Lokken ever exercised or possessed authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline other employees, or effectively recommend such action. However, the parties disagree concerning how much authority Lokken possessed to assign employees, to responsibly direct them, and to adjust their grievances.

The Supervisor/Dispatcher Office Report forms which Lokken completed documented some occasions when she allowed an employee to leave early. For example, on the report for August 10, 2004, Lokken wrote, "Jim Rock left early because of other job injury. I let Derek leave early–very slow (Business not Derek)."

Lokken testified that when work was slow, she selected which driver could leave early based on the amount of hours each driver already had worked. She would choose the driver who had worked the most hours, to minimize the amount of overtime the Respondent had to pay.

On a report which Lokken completed on September 9, 2004, she wrote "I called Tuan in early." Lokken denied that she possessed or ever exercised any authority to compel an employee to report for work early, rather than merely requesting it. The evidence does not establish that she had such authority.

Lokken's boss, Keith Bateman, issued an August 23, 2004 memo to supervisors, overnight cashiers and drivers, concerning problems with the shuttles being dirty. The memo stated that the supervisors must inspect the outside of the shuttle for damage and the inside for cleanliness before the driver parked the shuttle at the end of the shift. The memo set forth other guidelines pertaining to the shuttle and concluded "Supervisors are responsible for overseeing that these guidelines are met."

However, the memo does not indicate that the supervisor/dispatchers possessed any authority to enforce the guidelines by imposing or effectively recommending disciplinary action. No other evidence establishes that supervisor/dispatchers had such authority, and I conclude that they did not.

In sum, although the record does not indicate that the supervisor/dispatchers possessed or exercised any authority to act on the employer's behalf in adjusting grievances, I find that Lokken and other supervisor/dispatchers did possess and exercise some authority to assign and direct employees.

To establish that an individual is a Section 2(11) supervisor, however, Respondent must show that the exercise of this authority was not of a merely routine or clerical nature, but required the use of independent judgment. Respondent points out that the complexity of a task does not determine whether or not the individual used independent judgment. On the other hand, a party asserting that someone is a supervisor must show that the judgment exercised was something more than merely routine or clerical.

The present record does not establish that Lokken or any of the other supervisor/dispatchers exercised any judgment, or made any decision, which went beyond the routine. Clearly, deciding which employee could leave early based on hours worked does not entail the use of much independent judgment and neither did the other decisions made by the supervisor/dispatchers.

Respondent stresses that during half of each shift, no higher management personnel were present at the facility even though 13 or so employees might be on duty. Respondent also notes Respondent had a large amount of expensive equipment at the jobsite and that Lokken had the only key to the cash box, which typically might contain thousands of dollars.

These arguments go to the amount of trust Respondent placed in the supervisor/dispatchers rather than to the amount of independent judgment they possessed and exercised.

In sum, I conclude that the evidence fails to establish that either Lokken or the other supervisor/dispatchers were supervi-

sors within the meaning of Section 2(11) of the Act. Therefore, I conclude that Respondent violated the Act by discharging Lokken and also by the statements described in Complaint subparagraphs 5(a) through 5(d).

The Challenged Ballots

As already noted, during the November 30, 2004 election, the Board agent challenged the ballots of five persons in the supervisor/dispatcher job category because these individuals were not listed on the voter eligibility list. In its prehearing brief, Respondent expressed willingness to stipulate that one of these supervisor/dispatchers, Annette Carlson, was not a 2(11) supervisor. She worked on the day shift, the brief explained, where higher management was present.

However, for reasons already discussed I have concluded that none of the individuals met the Section 2(11) definition of supervisor. Moreover, one of them, Robin Lokken, had been discharged unlawfully. Accordingly, I recommend that the challenges to their ballots be overruled.

The Board agent also challenged the ballot of driver James Rock because his name wasn't on the voter eligibility list. The Union contends that Rock was on a leave of absence at the time of the election. Respondent asserts that Rock, a part-time employee, earlier had informed management that he could no longer work for Respondent during the scheduled hours because those hours conflicted with his fulltime job as a mechanic with Northwest Airlines. Accordingly, Respondent asserts, Rock's employment was terminated.

To support its argument that Respondent never terminated Rock's employment, the Union states that Rock never received an employment termination notice prescribed by Minnesota law. It also alludes to evidence suggesting that Respondent was ordering a jacket for Rock to wear upon his return to work in January.

With respect to the notice of termination argument, Minnesota Statutes 2002, section 181.933, subdivision 1, states as follows:

> **Notice required**. An employee who has been involuntarily terminated may, within 15 working days following such termination, request in writing that the employer inform the employee of the reason for the termination. Within ten working days following receipt of such request, an employer shall inform the terminated employee in writing of the truthful reason for the termination.

No one contends that Rock suffered an involuntary termination. Rather, the issue concerns whether he quit or took a leave of absence. Moreover, the record does not establish that Rock requested a written statement concerning termination of his employment. In these circumstances, the state law pertaining to involuntary terminations does not apply.

Because the cited Minnesota statute did not impose a duty on Respondent to provide Rock with a written termination notice, and because no evidence establishes either that Respondent otherwise had a duty to provide such notice or a practice of doing so, no inference can be drawn from the fact that Rock did not receive one.

With respect to the jacket argument, the evidence does not convince me that Respondent intended to order a jacket for Rock. Additionally, its payroll records indicate that Rock's employment was terminated on October 27, 2004.

The Union contends that this termination date is suspicious because it was a considerable time after Rock informed management of the job conflict and stopped working for Respondent part–time. However, that argument is not persuasive.

The general rule is that to be eligible to vote in an election, an employee must be working during the specified eligibility period and also at the time of the election. When they entered into the Stipulated Election Agreement, the parties agreed that the eligibility period would be the payroll period ending October 29, 2004. Clearly, Rock was not working for Respondent on that date. Rock also was not working for Respondent on November 30, 2004, the day of the election.

Accordingly, Rock was not eligible to vote in the election. Therefore, I recommend that the challenge to his ballot be sustained.

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, Remedy, Order and Notice. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

Throughout this proceeding, all counsel have demonstrated high standards of professionalism and civility, which are truly appreciated. The hearing is closed.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT tell employees that we have discharged an employee because that employee supported a union or engaged in other activities protected by the Act.

WE WILL NOT tell employees that supporting a union may make an employee ineligible for reinstatement.

WE WILL NOT condition the reinstatement of an employee on the employee's renouncing or abandoning support for a union.

WE WILL NOT discourage employees from supporting the union by asking them to tell us their work–related grievances and promising to remedy those grievances.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Robin Lokken immediate and full reinstatement to her former position, or to a substantially equivalent position if her former position is not available, and WE WILL make Robin Lokken whole, with interest, for all losses she suffered because of our unlawful discrimination against her.

PARK ʻN GO OF MINNESOTA, LP